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No. 95-346 and 95-345

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,
v.
GUY JEROME URSERY,
Respondent,
and
UNITED STATES OF AMERICA,
Petitioner,
v.
FOUR HUNDRED FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, et al.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth and Sixth Circuits

BRIEF OF THE COUNTIES OF SAN BERNARDINO, ALAMEDA, SAN JOAQUIN AND KERN, CALIFORNIA, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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The amici curiae, the District Attorney of San Bernardino County, California, and the Counties identified on the cover, through their respective District Attorneys and deputy district attorneys, respectfully submit this brief pursuant to Rule 37, Section 4, of the RULES of the SUPREME COURT of the UNITED STATES.

STATEMENT OF INTEREST

The Ninth Circuit Court of Appeals set aside the civil forfeiture of drug proceeds as a second "punishment" in violation of the Double Jeopardy Clause finding the defendants had been previously convicted of related criminal charges in a "separate proceeding." Although the court decision examines the federal statute, 21 U.S.C. Section 881(a)(6), the state of California has a comparable statute which is patterned after the federal statute, California Health and Safety Code Section 11470(f).[1] Since federal law is persuasive in California appellate courts interpreting the state asset forfeiture statute, *People v. Superior Court (Moraza)*, 210 Cal.App.3d 592; 258 Cal.Rptr.2d 499 (1989); *People v. $8,921.00 U.S. Currency*, 28 Cal.App.4th 1226, 1232, n. 6; 34 Cal.Rptr.2d 210 (1994), California prosecutors have faced numerous challenges to the state asset forfeiture law based on the Ninth Circuit ruling challenged in this appeal.

Civil in rem forfeiture is a vital part of the California law enforcement strategy to strip drug traffickers of their illicit proceeds, *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), and to effectuate the remedial purposes of California Health and Safety Code section 11469(j).

United States v. $405,089.23, 33 F.3d 1210 (9th Cir. 1994), *amended* 56 F.3d 41 (9th Cir. 1995), *cert. granted*, (U.S. Jan. 12, 1996) (No. 95-346) and the companion case of *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), *cert. granted*, (U.S. Jan. 12, 1996) (No. 95-345) question the

[1]The version of the California Health and Safety law applicable on January 1, 1989 through December 31, 1993 is found at Stats. 1988, c. 1492, (A.B. 4162, Katz). The law was subsequently amended on August 19, 1994, effective on January 1, 1994, by Stats. 1994, c. 314 (A.B. 114, Burton).

constitutionality of separately filed civil in rem proceedings and criminal prosecutions based on the same offense if they are not litigated in the "same proceeding." California Health and Safety Code sections 11470-11495 provide for a civil in rem proceeding which is comparable to the federal civil in rem proceeding found at 21 U.S.C. Section 881. Failure to litigate these cases in a single proceeding has raised challenges to the state forfeiture statute alleging additional violations of the Double Jeopardy Clause.

Finally, the Respondents (Charles Arlt, James Wren, Payback Mines) have filed an appeal from the forfeiture judgment obtained under the California state civil in rem forfeiture law (*People v. 1986 Chevrolet Crew Cab Pickup, et al.*, No. E013870 (Cal. Ct. App., 4th App. Dist., Div. 2, briefed Aug. 17, 1995), in which they are requesting the court to reverse the judgment based on violations of the Double Jeopardy Clause as interpreted by the Court of Appeals in *$405,089.23*. A decision on that appeal is still pending and this Court's decision in the present appeal will impact that case as well as California state asset forfeiture law.

SUMMARY OF ARGUMENT

The constitutional issues to be resolved by this Court are of crucial significance to state and local law enforcement entities. The appellate decisions under review have unleashed a deluge of litigation by criminal defendants seeking to dismiss criminal convictions and sentences and claimants attempting to set aside civil forfeiture judgments. The impact has extended far beyond the realm of asset forfeiture litigation and imperils the use of any administrative hearing or civil sanction by the government.

The intent of the Court to curtail government overreaching and abuse of power has been ill-served by application of the Fifth Amendment Double Jeopardy Clause in *United*

States v. Halper 490 U.S. 435 (1989), because of the internal inconsistency of the language within the case and the formulation of an imprecise standard of review which is not appropriate for all civil sanctions. The application of *Halper* and its progeny to parallel criminal and civil cases has cast doubt upon the continued vitality of the use of any civil sanctions by governmental agencies. The prophylactic powers envisioned by the Court are properly addressed by the Eighth Amendment Excessive Fines Clause which is better suited to evaluate and balance the punitive and remedial factors encountered in individual cases.

Relying on language from *Austin v. United States*, 113 S. Ct. 2801 (1993) the Ninth and Sixth Circuits incorrectly determined that all forfeiture cases are "punitive" for constitutional analysis under the Fifth Amendment. The correct analysis demonstrates that "proceeds" forfeitures are never punishment because they simply part the illicit fruits of crime from those with no lawful interest in them and that "instrumentality" forfeitures are not punitive so the long as they serve "rough remedial justice" and compensate the government for the societal costs and damages incurred on account of the criminal activity.

Finally, in *$405,089.23* and *Ursery* the appellate courts determined that parallel criminal and civil cases violate the Fifth Amendment unless they are brought in a "single proceeding." The proper holding is that separate criminal and civil sanctions do not raise double jeopardy protections because they involve neither two criminal trials nor two criminal punishments. The conflicting rights and issues inherent in parallel criminal and civil actions cannot be addressed by a single proceeding and would raise serious constitutional questions. Additionally there is no requirement that parallel criminal and civil cases be litigated in a "single proceeding" when they are brought by separate federal and state entities under the "dual sovereign rule."

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS HAS A DETRIMENTAL IMPACT ON CALIFORNIA ASSET FORFEITURE LAW

Since September 1994, when the Ninth Circuit Court of Appeals issued its opinion in *$405,089.23*, California state prosecutors have seen a marked increase in double jeopardy litigation.

The main effort has been directed against "parallel" criminal prosecutions and civil in rem forfeiture actions. Attempting to avoid the imposition of criminal penalties, many defendants have brought motions to set aside criminal convictions and incarceration on the basis of a civil forfeiture judgment that was incurred prior to the criminal conviction. Because of *$405,089.23*, some of those efforts have been successful and, as in *Ursery*, criminal convictions have been dismissed and sentences reversed (*People v. Marshalek*, No. B099586 (Cal. Ct. App. 2nd App. Dist., Div. 6, *appeal docketed* Feb. 1, 1996); *People v. Prince*, No. A067920 (Cal. Ct. App., 1st App. Dist., Div. 1, argued Jan. 10, 1996)). Numerous petitions for habeas corpus relief have been filed at all levels of the state judiciary by incarcerated defendants attempting to set aside criminal sentences (e.g., *In re Jeffrey Allen Biddinger on Habeas Corpus*, No. S049426 (Cal., *pet. for review denied* Dec. 21, 1995)). Other parties have attacked civil forfeiture judgments based on a prior criminal conviction (e.g., *People v. 1986 Chevrolet Crew Cab Pickup, et al.*, No. E013870 (Cal. Ct. App., 4th App. Dist., Div. 2, briefed Aug. 17, 1995)).

However, the most significant impact of the *$405,089.23* decision is now being observed in areas of criminal prosecution unrelated to drug asset forfeiture. The ability of administrative agencies to hold administrative hearings and

impose administrative sanctions is severely threatened. Challenges to Department of Motor Vehicle license revocation hearings, *Baldwin v. Department of Motor Vehicles,* 35 Cal.App.4th 1630; 42 Cal.Rptr. 2d 422 (1995), *modified*, 36 Cal.App. 4th 545N and prison board disciplinary hearings involving loss of good time credits, *United States v. Brown,* 59 F.3d 102 (9th Cir. 1995), have already been filed in California. Future attacks are expected to challenge actions by state agencies revoking licenses of medical, legal and education professionals and building contractors, regulating business enterprises such as liquor stores, securities, and insurance companies, and setting industrial occupational safety standards. If any type of administrative action is imposed which could be interpreted as "punishment" under the definition articulated by the Court of Appeals in *$405,089.23*, any subsequent criminal prosecution would be barred.

The continued viability of the *$405,089.23* decision could have serious consequences for law enforcement. Currently, state legislatures have empowered prosecutors to utilize civil remedies to combat crime in areas unrelated to narcotic asset forfeiture such as consumer, insurance and welfare fraud, child support, and environmental law. This is deemed appropriate as these are areas that are not effectively controlled by traditional criminal punishment such as incarceration. The rationale of the Ninth Circuit Court of Appeals in *$405,089.23* pertaining to "punishment" and "single proceedings" could prevent prosecutors from utilizing any type of civil sanction to combat these emerging areas of economic crime.

II.

THE COURT SHOULD APPLY THE EIGHTH AMENDMENT TO SEPARATE CIVIL SANCTIONS

The focus of the majority opinions in both *United States v. Halper,* 490 U.S. 435 (1989) and *Department of Revenue of Montana v. Kurth Ranch,* 144 S. Ct. 1937 (1994) is the excessiveness of the additional punishment, not the separate civil proceedings under the federal False Claims Act or the state Dangerous Drug Tax Act. Yet it has been the application of the separate-proceeding prong of the Double Jeopardy Clause that seems to have caused most of the present muddle. Irrespective of whether or not there is a viable multiple-punishment prong within the Double Jeopardy Clause, amici counties urge the Court to abandon its application of the Double Jeopardy Clause to separate civil actions in favor of applying solely the developing criteria under the Eighth Amendment Excessive Fines Clause to such actions, whether they are forfeitures, license suspensions, civil fines or any other civil sanction.

It has been twice suggested by members of this Court that the Fifth Amendment Double Jeopardy Clause has been pressed into service unnecessarily to reach a result that could have been reached under the Eighth Amendment. Justice O'Connor stated that the decision in *Kurth Ranch* was "entirely unnecessary to preserve individual liberty, because the Excessive Fines Clause is available to protect criminals from governmental overreaching." *Kurth Ranch,* 114 S. Ct. at 1955 (O'Connor, J., dissenting). Justice Scalia noted that:

> [t]he Excessive Fines Clause — which was rescued from obscurity only after *Halper* was decided, [citations omitted] — may well support the judgment in *Halper.* Indeed it may even *explain* the judgment in *Halper,* since much of the language of that opinion

> suggests that the Court was motivated by concern for the harsh consequences of applying a per-transaction penalty to a "prolific but small-gauge offender" *Halper*, 490 U.S. at 449.

Id. at 1958, n.2 (Scalia, J., dissenting).

Since this Court's decision in *Austin v. United States*, 113 S. Ct. 2801 (1993), the Circuit Courts have been active in attempting to define the parameters of the Excessive Fines Clause. See *e.g. United States v. Certain Real Property Located at 11869 Westshore Dr.*, 70 F.3d 923 (6th Cir. 1995); *United States v. Real Property Located in El Dorado County at 6380 Little Canyon Rd.*, 59 F.3d 974 (9th Cir. 1995); *United States v. Milbrand*, 58 F.3d 841 (2d Cir. 1995); *United States v. Chandler*, 36 F.3d 358 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995); *United States v. One Parcel of Real Property, Located at 9638 Chicago Heights*, 27 F.3d 327 (8th Cir. 1994); *United States v. Meyers*, 21 F.3d 826 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 742 (1995); *United States v. RR #1, Box 224*, 14 F.3d 864 (3d Cir. 1994); *United States v. One Single Family Residence Located at 18755 N. Bay Rd.*, 13 F.3d 1493 (11th Cir. 1994). While it is still early and, certainly, this Court has yet to speak to the specifics, the contours of the Eighth Amendment test are sufficiently visible to reveal that the same results would have been achieved in *Halper* and *Kurth Ranch* through the application of the Eighth Amendment Excessive Fines Clause rather than the Fifth Amendment Double Jeopardy Clause.

With the exception of the Fourth Circuit, which adopted a pure "instrumentality" test in *Chandler*, 36 F.3d at 365, the Circuit Courts addressing the excessive fines issue have at least recognized as permissible a hybrid test which first utilizes an "instrumentality" test and then applies a "proportionality" analysis to determine the applicability of the Eighth Amendment.

The "instrumentality" test focuses on the "taint" of the property stemming from its unlawful use. As established in *Chandler*, the court balances the nexus between the offense and the property, the role and culpability of the owner, and the possibility of separating the tainted property from other property. *Chandler*, 36 F.3d at 365. "Proportionality analysis compares the value of the property to a variety of factors which may include culpability of the claimant, the gravity of the offense, the relationship of the property to the offense and the harm caused to the community." *11869 Westshore Dr.*, 70 F.3d at 927.

Applying these principles to the *Halper* and *Kurth Ranch* facts, it is clear that the same results would have been reached under the Eighth Amendment Excessive Fines Clause as was reached under the Fifth Amendment Double Jeopardy Clause. The civil fine in *Halper* and the tax lien in *Kurth Ranch* would have been satisfied out of legitimately acquired assets which had no nexus to the criminal activities of Mr. Halper or the Kurth family. Thus, even under the pure "instrumentality" test adopted by the Fourth Circuit, the civil fine and tax would not have withstood constitutional scrutiny.

The Eighth Amendment Excessive Fines Clause is better suited to evaluate claims of governmental overreaching and abuse of power because it has the flexibility to apply the appropriate test developed by the lower courts as directed in *Austin* and to either uphold the forfeiture or mitigate any excessiveness by reducing the forfeiture to an amount determined by the court to be justified under the circumstances of the individual case. *Real Property Located in El Dorado County, Id.* at 59 F.3d at 986; *United States v. Bieri*, 21 F.3d 819, 824-25 (8th Cir.) *cert. denied*, 115 S.Ct. 208 (1994); *Appeal after remand*, 68 F.3d 232 (8th Cir. 1995). By contrast, the only option under the Fifth Amendment Double Jeopardy Clause is the complete dismissal of the

action determined to be a multiple punishment or successive prosecution.

By utilizing the Eighth Amendment, any excessiveness could be curtailed without creating the legal quagmire resulting from the application of the Double Jeopardy Clause to traditional civil sanctions such as license suspensions, civil forfeitures, consumer fraud, child support, and environmental law; in short, all the areas where legislatures have authorized parallel criminal and civil sanctions.

III.

THE COURT SHOULD RECONSIDER ITS DECISION IN UNITED STATES V. HALPER

Three members of this Court have questioned the viability of the *Halper* decision in the wake of the flood of double jeopardy litigation which that decision engendered.[2] *$405,089.23* and *Ursery* represent but a modest portion of the plethora of cases which have been litigated in an attempt to resolve the government's use of criminal and civil sanctions in parallel or related proceedings. Since the Ninth and the Sixth Circuits relied in great measure upon the *Halper* decision, the resolution by this Court of the issues presented in *$405,089.23* and *Ursery* will of necessity resolve many of the Double Jeopardy issues being litigated in areas outside narcotics asset forfeiture. For this reason, as well as the reasons set forth below, amici counties urge the court to reconsider its decision in *Halper*.

Of primary concern is the internal inconsistency of the *Halper* decision. On page 448, the Court states that: "[A] civil sanction that **cannot be said solely to serve a remedial**

[2] Justices Scalia and Thomas in *Witte v. United States*, 115 S. Ct. 2199 (1995), and Justice O'Connor in *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994).

purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Halper*, 490 U.S. at 448 (emphasis added). Courts have relied upon this language to find that *Halper* prohibits the imposition of a civil sanction which serves a remedial purpose if it in any way also deters unlawful conduct. Put another way, if the sanction were 90% remedial and 10% retributive, it is punishment for double jeopardy purposes. This is the view taken in *$405,089.23*, *Ursery* and now more recently in *United States v. 9844 South Titan Court*, 1996 WL 49002 (10th Cir. Feb. 5, 1996).

Returning to *Halper*, the next sentence in the opinion states: "We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, **but only as deterrent or retribution.**" *Halper*, 490 U.S. at 448-449 (emphasis added). This language conflicts with the earlier language. Under this rationale a civil sanction would have to be 100% retributive before it would run afoul of the Constitution. Courts have relied upon this language to find that *Halper* permits the government to impose civil sanctions which can be characterized as partially punitive and partially remedial. See, *e.g.*, *United States v. Brown*, 59 F.3d 102 (9th Cir. 1995); *People v. $1,930.00 U.S. Currency*, 38 Cal. App. 4th 834; 45 Cal. Rptr. 2d 322 (1995), *modified* 39 Cal. App. 4th 1210B (1995). This conflict in *Halper* has created significant problems and should be resolved.

Halper's utilization of a sliding scale to determine when a Double Jeopardy violation occurs also must be reexamined. While examining whether the civil sanction approximates the government's expenses works in the context of the fines imposed in *Halper*, such a standard is ill-suited to determin-

ing whether other civil sanctions violate double jeopardy. How, for example, could a court determine if a 30-day administrative suspension of a driver's license for driving under the influence does or does not compensate the government for costs incurred in the prosecution of driving under the influence cases? In another context, assume State *A* spends more money to fight drug trafficking than State *B*. If the government seeks to forfeit assets of equal value from drug dealers in State *A* and *B*, the forfeiture might pass constitutional muster in State *A*, but not State *B*. These are but two examples of the problems created by *Halper's* use of a sliding scale to determine if a civil sanction violates double jeopardy, all of which illustrates the need for this Court to reexamine the *Halper* decision.

IV.

CIVIL IN REM FORFEITURE IS REMEDIAL, NOT PUNITIVE, FOR ANALYSIS UNDER THE FIFTH AMENDMENT DOUBLE JEOPARDY CLAUSE

The predicate question that must be answered before the constitutional issues can even be broached, is the determination of whether the remedy chosen by the sovereign to protect the public welfare is remedial or punitive. *Halper,* 490 U.S. at 448-449; *Austin,* 113 S. Ct. at 2812. As the court stated at *Halper,* "[t]he relevant teachings of these [double jeopardy] cases is that the Government is entitled to rough remedial justice."[3] *Halper,* 490 U.S. at 446. However, *$405,089.23* does not even take this first, vital step. If it did, its holding would have been in conformance with the Fifth Circuit. *United States v. Tilley,* 18 F.3d 295 (5th Cir. 1994). *cert. denied,* 115 S. Ct. 574 (1994).

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[3]This language appears to be at odds with the courts summary dismissal of the Government's assertion in *Austin,* 113 S. Ct. at 2812.

Indeed, the court presents the prosecutor with a Hobson's choice: (1) choose the civil remedy and the criminal buys his way out of prison; or (2) choose the criminal remedy and the criminal retains his ill-gotten gains. *$405,089.23,* 33 F.3d at 1221. This choice puts the prosecutor on the horns of a dilemma, with society being the ultimate loser.

Pre-*Austin* criminal forfeiture case law held that proceeds forfeitures were not excessive as they merely removed the illegal fruits of the crime from the defendant. See, *United States v. Sarbello,* 985 F.2d 716, 723, n.12 (3rd Cir. 1993); *United States v. Feldman,* 853 F.2d 648, 663 (9th Cir. 1988), *cert. denied, Feldman v. United States,* 489 U.S. 1030 (1989). As this Court emphasized in *Caplin & Drysdale,* it is the "restitutionary ends" of proceeds forfeiture and the "strong governmental interest in obtaining full recovery of all forfeitable assets" that was determinative. *Caplin & Drysdale,* 491 U.S. at 629-631. Even in the *Austin* decision, Justice Blackmun, in discussing the extent of the excessive fines clause stated: "The Clause prohibits only the imposition of 'excessive' fines, and a **fine that serves purely remedial purposes cannot be considered 'excessive' in any event.**" *Austin,* 113 S. Ct. at 2812, n.14 (emphasis added).

The question that remains unanswered is whether the remedy sought is remedial? If so, how is that determined? For guidance, the intent of the Congress should be considered: "[p]rofit is the motivation for this criminal activity, and it is through economic power that it is sustained and grows."[4] The Comprehensive Forfeiture Act represents, above all, Congress's attempt to "strip these offenders and organizations of their economic power." *In re Forfeiture of Caplin & Drysdale,* 837 F.2d 637 648 (1988); *aff'd, Caplin & Drysdale v. United States,* 491 U.S. 617 (1989). The

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[4]S.Rep. No. 225, 98th Cong., 1st Sess. 1991, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3374.

California legislature has made the same determination. Cal. Health & Safety Code § 11469(j) (West 1994).

Along with the legislature, California courts have long recognized that the goal of forfeiture laws was to strip economic power from drug dealers. *People v. Superior Court (Clements)*, 200 Cal. App. 3d 491, 498; 246 Cal. Rptr. 2d 122 (1988). Indeed, the California courts, when faced with this same issue, found that if there was a rational relationship between the harm occasioned by the criminal conduct and the proportionate value of the property sought to be forfeited, then the forfeiture would be serving a remedial purpose. *People v. $1,930.00 U.S. Currency*, 38 Cal. App. 4th 834; 45 Cal. Rptr. 2d 322 (1995), *modified* 39 Cal. App. 4th 1210B (1995).

The clear conclusion to be reached is that if the law accomplishes its goal of stripping the economic profits of criminal activity and recapturing the costs of the criminal harm, then the law serves a remedial purpose. The question posed in *Halper* should have been answered in this manner: even if a civil sanction cannot be said to solely serve a remedial purpose, it can still be remedial.

What are the liquidated damages, or remedial goals, owed to society for the criminal harm? In most circumstances, these "costs" are difficult, if not impossible, to calculate. They range from the pain and grief of the spouse of a slain policeman to the medical expenses paid to treat a victim of a drug overdose. Still, some costs are representative and can be used as a measurement of the "rough justice" being sought.

In 1992, the Federal Government spent $17.423 billion dollars on the criminal justice system.[5] In 1992, there were

[5] Bureau of Justice Statistics, U.S. Department of Justice, *Sourcebook of Criminal Justice Statistics — 1994*, at 2 (1995).

119,843 drug abuse related episodes in the country's emergency rooms. It is estimated that those episodes will increase to 123,317.[6] In 1993, seventy police officers lost their lives in the line of duty, three of those while enforcing the drug laws.[7] Additionally, in two of California's large urban centers over 70% of those individuals arrested for all crimes tested positive for drugs.[8]

There are other, more imprecise, costs that must be considered. These categories of the damage and costs are legion.[9] Consider just two categories for purposes of illustration so that we have a sense of their scope. The first that should be examined is the damage to the health of all these users.[10] The second is the damage and health costs of the unborn/newborn children of pregnant female users.[11]

Given the high cost of medical treatment today, and the intrinsic damage done to these individual human beings, the harm caused by the criminal conduct is disproportionate to the economic impact on society. To put it another way, rough justice would permit the forfeiting of any drug trafficking related property to recapture these costs to society. Recapturing these costs would not, therefore, be punitive.

[6] *Id.*, at 297.

[7] *Id.*, at 354.

[8] *Id.*, at 415. (Los Angeles, 77% and San Diego, 78%)

[9] Professor Frank O. Bowman, III, *Playing "21" with Narcotics Enforcement*, 52 Wash. & Lee L. Rev. 937, 966-967 (1995).

[10] *Id.*, citing, *Physiopathology of Cannabis, Opiates and Cocaine* (G.G. Nahas & C. Latour eds., 1991); Steven R. Belenko, *Crack and the Evolution of Anti-Drug Policy*, 33-41 (1993).

[11] *Id.*, citing, Robert E. Peterson, *Legalization: The Myth Exposed, in Searching for Alternatives: Drug Control Policy in the United States* 324 (Melvin B. Krauss & Edward P. Lazear eds., 1991).

These costs are the liquidated damages approved in *Halper* which can be obtained through the civil forfeiture process for the criminal conduct which has visited such harm on society. Since this is the ultimate goal of civil forfeiture, these statutes are clearly remedial, even though from the perspective of the person whose property is being forfeited, they may appear punitive. However, given the rational relationship between the criminal harm and the costs to society, the remedial aspect of the law overshadows any punitive impact, and would not invoke any constitutional protection, such as double jeopardy.

Specifically, as to the forfeiture of proceeds, since *$405,089.23* departs from an established line of federal precedent and misconstrues the definition of punishment set forth in *Austin* as applied to purely remedial statutes, amici counties urge the court to reject it and to follow the principles summarized in *United States v. Alexander*: "Forfeiture of proceeds cannot be considered punishment, and thus, subject to the excessive fines clause, as it simply parts the owner from the fruits of the criminal activity." *United States v. Alexander*, 32 F.3d 1231, 1236 (8th Cir. 1994).

V.

THE CONSTITUTION DOES NOT PROHIBIT THE IMPOSITION OF PARALLEL CIVIL SANCTIONS TO DETER CRIME

In *$405,089.23* the court opined that the government should either include the criminal forfeiture count on the criminal indictment or pursue only the civil forfeiture action. *$405,089.23*, 33 F.3d at 1216-1222. This option prevents the government from utilizing the full range of criminal and civil sanctions to deter crime and requires it to elect which sanction it will impose. This unduly limits the power of government to utilize all of its statutory powers to deter crime.

There is no constitutional prohibition against parallel criminal and civil investigations. *Securities and Exchange Commission v. Dresser Industries Inc.*, 628 F.2d 1368 (D.C. Cir. 1980), *cert. denied, Dresser Industries v. Securities and Exchange Commission*, 449 U.S. 993 (1980). Indeed, this Court has held that the state has a justifiable interest in conducting a concurrent criminal investigation along with a civil action as "[i]t would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial. *United States v. Kordel*, 397 U.S. 1, 11 (1970). In essence there is no constitutional, statutory or common law rule that bars the simultaneous prosecution of separate civil and criminal actions by different agencies against the same defendant involving the same transaction. The government is entitled to vindicate several interests simultaneously in different forums. *Securities & Exchange Commission v. First Financial Group of Texas*, 659 F.2d 660, 666-667 (5th Cir. 1981).

The court in *$405,089.23* failed to recognize that criminal forfeiture is only possible when authorized by statute and that not even all federal criminal statutes have criminal forfeiture provisions. The opinion is even more problematic for states like California which do not have criminal narcotic forfeiture statutes. This leaves the state in the position of making a choice between **either** the criminal punishment **or** the civil sanction. This limitation on the power of the federal or state government to utilize the full panoply of criminal and civil sanctions is in direct contradiction of the law as stated by this Court in *Kordel*.

Separate criminal and civil sanctions do not raise double jeopardy protections because they involve neither two criminal trials nor two criminal punishments, *United States v. One*

Assortment of 89 Firearms, 465 U.S. 354, 361 (1984); *One Lot of Emerald Cut Stones v. United States*, 409 U.S. 232, 235 (1972), or they are litigated in the same proceedings. *Halper*, 490 U.S. at 450; *Kurth Ranch*, 114 S. Ct. at 1945, 1948. In *$405,089.23* and *Ursery*, the appellate courts set aside a civil forfeiture and a criminal conviction because the cases were not resolved in the same proceeding.

The appellate courts in *$405,089.23* and *Ursery* failed to recognize the impracticality of litigating criminal cases and civil actions in a single proceeding. Criminal and civil cases involve completely separate parties and issues. Whereas criminal cases involve the personal culpability of individuals accused of violating the law, civil in rem forfeiture cases focus on the property, its nexus to illegal activity and the property rights of individuals asserting an interest in the property. Frequently, forfeiture actions involve the resolution of the rights of third parties including commercial entities who may have some legitimate legal interest in the property that would preclude forfeiture. The requirement of a literal single proceeding tied to the criminal case will impair and delay the ability of these third parties, who are not criminal defendants, to litigate and resolve their property interests separate from the criminal prosecution to which they have no standing or interest.

These appellate decisions also fail to acknowledge the different governmental interests being pursued between criminal and civil actions. In a criminal action the state is asserting its power to punish an individual whereas in a civil action that state is attempting to obtain remedial relief to vindicate a state interest in the alleged forfeitable property. Requiring the criminal and civil actions to be litigated in the same proceeding would deny the state access to the equitable powers of the civil courts and the use of civil procedures to obtain swift equitable relief.

The conflicting rights and issues inherent in competing criminal and civil actions are ill served by a single proceeding. Indeed, serious constitutional questions are implicated in a single proceeding, including the Fifth Amendment's Self Incrimination Clause and the Sixth Amendment's Rights to Counsel and to Trial by Jury. Civil discovery rules are very broad and may give an unfair advantage in a criminal trial to either the defense or prosecution. *Kordel*, 397 U.S. at 11-12. How can a court separate criminal and civil discovery rules in the same proceeding? Additionally, where a defendant may have a right to appointed counsel in the criminal action, that same right does not apply to the civil action. *United States v. $100,375.00 in U.S. Currency*, 70 F.3d 438 (6th Cir. 1995); *United States v. $292,888.04 in U.S. Currency*, 54 F.3d 564 (9th Cir. 1995); *United States v. 7108 West Grand Avenue*, 15 F.3d 632 (7th Cir. 1994), *cert. denied, Flores v. United States*, 114 S. Ct. 2691 (1994). Further, a defendant may have a right to a jury trial in the criminal prosecution but not in the civil litigation. *Libretti v. United States*, 116 S. Ct. 356, 367-368 (1995).[12]

From the above discussion, and as this Court has previously acknowledged, "[t]here are often valid reasons why related crimes committed by the same defendant are not prosecuted in the same proceedings." *Witte*, 115 S. Ct. at 2208. In recognition of the unique procedural distinctions between criminal prosecutions and civil in rem cases, amici counties urge this Court to adopt the view of the government that parallel criminal and civil cases do not present the potential for abuse that the Double Jeopardy Clause was designed to prevent. *Halper*, 490 U.S. at 451, n.10.

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[12] Although California state law provides for joint trials of civil forfeitures with their underlying criminal cases (Health & Safety Code § 11488.5), the issues discussed above remain unresolved.

VI.

THE CONSTITUTION DOES NOT PROHIBIT SEPARATE PROCEEDINGS BY DUAL SOVEREIGNS

The court in *$405,089.23* criticizes the government practice of filing separate criminal and civil cases complaining that "such a manipulative prosecution strategy heightens, rather than diminishes, the concern that the government is forcing an individual to 'run the gauntlet' more than once." *$405,089.23,* 33 F.3d at 1216. Likewise, in *Ursery* the court commented on the lack of coordination of the criminal and civil cases and determined that the "civil forfeiture proceeding and criminal prosecution were two separate proceedings for purposes of double jeopardy analysis." *Ursery,* 59 F.3d at 575. Inferred from the rulings of these appellate courts is that unless all potential governmental action is imposed in one coordinated hearing the Double Jeopardy Clause is violated. What impact does such a ruling have on separate proceedings imposed by federal and state entities against the same individual?

Prior decisions of this Court have established that double jeopardy is not violated by successive prosecutions by different sovereigns based on the same conduct. *United States v. Lanza,* 260 U.S. 377, 382 (1922); *Abbate v. United States,* 359 U.S. 187 (1959). The "dual sovereign rule" has its basis in the concept of federalism that the state power to prosecute derives from separate and independent sources of power and authority that were retained by the states before admission to the Union and preserved to them by the Tenth Amendment. *Heath v. Alabama,* 474 U.S. 82, 88 (1985). This doctrine has been cited with approval by this Court in the recent opinion in *Kurth Ranch,* 114 S.Ct. at 1947, n.22. The only exception to the doctrine occurs where the State is bringing its action merely as a "tool of the federal authorities" and was a "sham or cover for the federal prosecution." *Bartkus v. Illinois,* 359 U.S. 121, 123 (1959). The dual

sovereign rule has been utilized by lower federal courts to uphold forfeiture cases where the criminal prosecution and civil forfeiture were handled by separate federal and state sovereign governments. *United States v. Certain Real Property (38 Whalers Cove Drive),* 954 F.2d 29, 38 (2d Cir. 1992), *cert. denied, Levin v. United States,* 506 U.S. 815 (1992).

In spite of this long line of court case precedent, in the aftermath of the appellate decisions of *$405,089.23* and *Ursery,* numerous challenges are being brought against separately filed criminal and civil cases that were litigated by separate sovereigns. In the federal system the Ninth and Eighth Circuits have addressed the issue, *Real Property Located in El Dorado County at 6380 Little Canyon Road,* 59 F.3d at 987; *United States v. Pena,* 67 F.3d 153, 155-156 (8th Cir. 1995) and seven district court decisions are reported out of the Ninth Circuit alone.[13] All of these cases upheld the separate criminal and civil proceedings on the authority of the dual sovereign rule.

The continued vitality of the dual sovereign rule has been questioned in a recent opinion from the Second Circuit where Justice Calabresi stated that "the exception's narrowness combine[d] with significant developments both in substantive federal criminal law and in criminal law enforcement indicate that the entire dual sovereignty doctrine is in need of serious consideration." *United States v. All Assets of G.P.S. Automotive Corp.,* 66 F.3d 483, 497 (2nd Cir.

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[13]United States v. Jackson, 904 F. Supp. 1185 (D.Or. 1995); *United States v. Wolf,* 903 F. Supp. 36 (D.Or. 1995); *United States v. Wright,* 902 F. Supp. 205 (D.Or. 1995); *United States v. Unger,* 898 F. Supp. 740 (D.Or. 1995); *United States v. Bradford,* 886 F. Supp. 744 (E.D. Wash. 1995); *United States v. De La Cruz Trujillo,* 882 F. Supp. 156 (D.Or. 1995), *aff'd, United States v. Trujillo,* 73 F.3d 371 (9th Cir. 1995); *United States v. Branum,* 872 F. Supp. 801 (D.Or. 1994).

1995).[14] Based on this comment and the vital constitutional issues presented in these cases, amici counties address the Court on the importance of maintaining the dual sovereign rule in civil forfeiture actions.

The dual sovereign rule is the core doctrine that acknowledges that States have inherent powers guaranteed to them under the Tenth Amendment to protect the peace and dignity of their sovereignty. *Abbate*, 359 U.S. at 194. For a federal prosecution to deprive the State of the ability to exercise its reserved state powers and obligation to control peace within its jurisdiction would be an affront to the principles of federalism established by the Founding Fathers of our constitutional form of government. *Bartkus*, 359 U.S. at 137-138. Further it would deny a State the power to enforce its own criminal laws because the federal sovereign "won the race at the courthouse." *Heath v. Alabama*, 474 U.S. at 93. To impose a requirement that all governmental sanctions be imposed in one unified hearing would be highly impractical as it would require federal and state authorities to attempt to keep informed of all potential related offenses. *Abbate*, 359 U.S. at 195.

The State has a constitutional right to exercise its separate power to confront crime within its jurisdiction and virtually all states have enacted state forfeiture statutes.[15] The states are not thereby dependent upon the federal authorities to exercise the forfeiture power. The purpose of

[14] A recent district court case following the reasoning of *All Assets of G.P.S. Automotive*, 66 F.3d at 497, is found at *United States v. Pena*, 1995 WL 769117 (D. Kan. Dec. 21, 1995) where the lower court ordered a *Bartkus* hearing to determine whether the federal government had an independent interest in a federal civil forfeiture following a state criminal prosecution.

[15] Lindsay D. Stellwagen, *Use of Forfeiture Sanctions in Drug Cases*, Research in Brief. Washington, D.C., National Institute of Justice (1985).

these statutes is to serve the compelling state interest of eliminating drug trafficking by stripping drug dealers (big and small) of their economic power base (the tools and profits of their trade). *Caplin & Drysdale*, 491 U.S. at 629.

States utilize the state forfeiture authority as an effective tool to deter economic crime and to complement parallel federal investigations. The case of *$405,089.23* is demonstrative of this principle. Charles Arlt and James Wren were charged by the federal government of conspiracy to manufacture methamphetamine and money laundering and were subsequently convicted. *United States v. Arlt*, 41 F.3d 516 (9th Cir. 1994).[16] The United States government filed a separate civil forfeiture on assets seized by federal and state authorities in connection with that federal criminal investigation in *$405,089.23*. State law enforcement authorities seized additional assets for forfeiture pursuant to California Health and Safety Code § 11470 and requested prosecution through the state civil forfeiture law. *People v. 1986 Chevrolet Crew Cab Pickup, et al*, No. E013870, (Cal. Ct. App., 4th App. Dist., Div. 2, briefed Aug. 17, 1995).[17]

Although, the federal sovereign filed separate criminal and civil actions, the state only filed a civil action on separate property unrelated to the federal civil forfeiture.[18] As there was no requirement of a criminal conviction for the state forfeiture action pursuant to California Health and

[16] Arlt's convictions were reversed and remanded for a new trial on December 1, 1994.

[17] According to a verified claim filed by Charles Arlt, the total value of the property seized in the state action was $374,200.

[18] Amici counties support the government's position that the federal civil forfeiture action filed against the assets of Charles Arlt, James Wren and Payback Mines, on the 'proceeds' theory of 21 U.S.C. section 881(a)(6) was remedial, not punitive, and was not a multiple punishment or successive prosecution in violation of the Fifth Amendment's Double Jeopardy Clause.

Safety Code section 11488.4(i),[19] the federal criminal conviction was not a prerequisite to the state forfeiture and a subsequent conviction or acquittal would not have barred the state forfeiture action. *One Assortment of 89 Firearms*, 465 U.S. at 367; *One Lot of Emerald Cut Stones*, 409 U.S. at 234-235. Consequently, since no state criminal charges were filed, no double jeopardy issue was raised in the state action. The state sovereign only pursued a civil remedial action which did not constitute punishment or run afoul of the Double Jeopardy Clause and was a valid use of its separate state power.

The forfeiture power exercised by federal and state authorities is not mutually exclusive and each sovereign has constitutional authority to vindicate the compelling governmental interest in recovering ill-gotten enterprise proceeds not forfeited by the other sovereign. Therefore, any requirement that two separate sanctions which constitute punishment must be litigated in the same proceeding should not be defined so narrowly as to preclude application of the dual sovereign rule.

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[19]The version of the California Health & Safety law applicable to this action is found at Stats. 1988, ch. 1492 § 9 which was the California asset forfeiture law in effect January 1, 1989 through December 31, 1993.

CONCLUSION

For all of the foregoing reasons, amici counties urge this Court to reverse the decisions of the Courts of Appeal in the instant cases.

Respectfully submitted,

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